

industry EEO oversight." NPRM, 11 FCC Rcd at 5163 ¶17.

By its own words, the Commission appears to be conceding its intention to coast along, rudderless, "maintaining" its program, and failing to provide the leadership to articulate why it needs to aggressively finish the job of ending discrimination and its present effects. "[M]aintaining effective EEO oversight" is hardly a pro-active campaign to fully emancipate minorities and women from the evils of discrimination. The Commission can hardly inspire compliance with the Rule unless its own resolve matches the resolve it expects of its licensees.^{24/}

The Commission's reputation for inconsistency in enforcement will only make it more difficult for a future FCC to convince the industry that it really means business if it says that discrimination is abhorrent and intolerable and that discriminators are disqualified from the privilege of licensure.

Thus, the second half of the job of ending discrimination will be more difficult than the first half, because it will require a Commission with impaired civil rights regulatory credibility to expose and prosecute discriminators who not only cover their tracks, but who cover their tracks carefully. There's not going to be another Beaumont, in which a licensee responded to a Bilingual

^{24/} See 47 CFR §73.2080(b)(4), requiring broadcasters to "conduct a continuing program to eliminate all unlawful forms of prejudice or discrimination based upon race, color, religion, national origin, or sex from its personnel policies and practices and working conditions" (emphasis supplied). The Commission's internal EEO program, which is outstanding, shows that the Commission itself welcomes and practices the EEO initiatives it hesitates to expect of its own licensees. The FCC's internal program has as its express goal "developing...policies to foster a workplace whose diversity reflects the diverse makeup of the Nation, enhances the mission of the Commission, and demonstrates the value and effectiveness of a diverse workforce." Creation of the Office of Workplace Diversity, 11 FCC Rcd 6864, 6865 (1996).

investigation with conflicting sets of explanations for the departures of nearly all of its Black employees. And unless a very dim bulb receives a broadcast license, there's not going to be another Rust (HDO), another Federal (HDO) or another Catootin.

This history of EEO violations reads like that of any other "white collar crime":^{25/} each advance in federal law enforcement is met with a new wave of concealment and avoidance strategies, each more sophisticated than the last. And like other forms of white collar crime, the flagging spirits of federal law enforcers invite massive industry lobbying which invokes "paperwork burdens" or some other feeble pretext for "deregulation." Today's EEO opponents have aimed to render EEO enforcement so ineffectual as to be nearly irrelevant. They want it stored away in the attic of the Commission's Rules, suitable only to be trotted out when evidence of "public interest commitments" is needed as protection against spectrum auctions.

Thus, since the tactics of broadcaster discrimination has evolved to the stage of careful coverups and high-tech lobbying, the Commission needs much stronger enforcement tools. Unfortunately, this NPRM proposes to give us exactly the opposite, beginning with the disgraceful signal manifested by the NPRM's name: "EEO Streamlining."

The Commission's unfortunate use of the code word "Streamlining" implies that equal opportunity is a Model T waiting

^{25/} The tactics of discriminators can be understood by studying the tactics of, e.g., importers of endangered species, dumpers of toxic wastes, manufacturers of shoddy airline parts, or entrepreneurs who set up front companies. It is irrelevant to an understanding of these tactics whether the conduct is regulated under a criminal or civil statute.

to be morphed into a Cadillac. Despite its new age moniker, the NPRM proposes severe cutbacks in civil rights enforcement. It permits, and on the flimsiest of grounds would deliberately promote, a shift of the balance of power and opportunity in the broadcasting industry even further away from minorities and women.

2. **The EEO Program is necessary to promote diversity, ensure public service by licensees of good character, and remedy the effects of past discrimination**

The EEO rule is both merit-based^{26/} and meritorious.

First, it responds directly to the problem of media stereotyping initially articulated by John B. Russworm, the founder of America's first Black newspaper.^{27/} The EEO Rule does so by fostering the First Amendment value of a robust diversity of voices,^{28/} an essential attribute of an industry which serves as

^{26/} Frankly, it is astounding that the Commission would seriously consider cutting back a program whose principal requirement is that broadcasters include likely sources of minorities and women in their searches for employees whenever they have jobs available. What could possibly be more "race-neutral", more benign, or more cost-efficient?

^{27/} "From the press...we have suffered much by being incorrectly represented....Our vices and our degregation are ever arrayed against us, but our virtues are passed by unnoticed." John B. Russworm, Freedom's Journal, March 16, 1827.

^{28/} Diversity was the core of EEO enforcement. Nondiscrimination - 1968, 13 FCC2d at 769. As the National Advisory Commission on Civil Disorders recognized earlier that year:

the ~~communications~~ media, ironically, have failed to communicate. They have not communicated to the majority of their audience - which is white - a sense of the degregation, misery, and hopelessness of living in the ghetto.

28/ [continued from p. 16]

They have not communicated to whites a feeling for the difficulties and frustrations of being a Negro in the United States. They have not shown understanding or appreciation of - and thus have not communicated - a sense of Negro culture, thought or history.

Report of the National Advisory Commission on Civil Disorders (Bantam ed. 1968) ("Kerner Report") at 383. Recognizing most broadcasters' isolation from Black Americans' criticisms of the "white press", the Commission mailed Chapter 15 of the Kerner Report to every broadcast licensee. Nondiscrimination - 1968, 13 FCC2d at 775.

The Kerner Report exposed and carefully dissected the mass media's failure to foster interracial communications. The report charged racism in the media with helping cause the 1960s' civil disturbances. Most significant was the Report's findings of the lack of sensitivity of the White media:

The media report and write from the standpoint of a white man's world. The ills of the ghetto, the difficulties of life there, the Negro's burning sense of grievance, are seldom conveyed. Slight and indignities are part of the Negro's daily life, and many of them come from what he calls the "white press" - a press that repeatedly, if unconsciously, reflects the biases, the paternalism, the indifference of white America. This may be understandable, but it is not excusable in an institution that has the mission to inform the whole of our society.

Id. at 203.

Owing to the growing complexity of society, knowledge of other groups is increasingly based on perceived personal characteristics. Abramson, Mizrucky and Hornung, Stratification and Mobility 9 (1976). When personal intergroup contact is absent or limited, media portrayals of members of other groups must instead serve the function of definition or confirmation of perceptions of other groups. Thus, when and if it addresses racial issues, the media can be a powerful force reducing negative stereotyping. Scherer, "Stereotype Change Following Exposure to Counter-Stereotyping Media Heroes," 15 Journal of Broadcasting 51 (1970). The power of the media to determine how group members know members of other groups is suggested by a classic study demonstrating that one quarter of young White viewers reported that "most of the things I know" about Blacks come from television viewing. Atkin, Greenberg & McDermott, "Television and Race Role Socialization," 60 Journalism Quarterly 407, 414 (1983).

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Unfortunately, "most of what [Whites] know" about Blacks from television has frequently been negative, stereotypical, incomplete or inaccurate. See Worthy, "Diversity and Minority Stereotyping in the Television Media: The Unsettled First Amendment Issue," 18 Comm/Ent 509 (Spring, 1996); Roberts, "The Presentation of Blacks in Television Network Newscasts," 52 Journalism Quarterly 50 (1975); Fife, "Black Images in American TV: The First Two Decades," 6 Black Scholar 7 (November, 1974); Roberts, "The Portrayal of Blacks on Network Television," 15 Journal of Broadcasting 45 (1970).

Faced with this and other evidence, the courts have recognized that the EEO Rule "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934 ... to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups." NAACP v. FCC, 425 U.S. 662, 670 n. 7 (1976). See also Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 548 (1990) ("Metro"), in which a court majority agreed that "[s]afeguarding the public's right to receive a diversity of views and information over the airwaves is...an integral component of the FCC's mission." The Metro Court also recognized that "the interest in enhancing broadcast diversity is, at the least, an important governmental objective." Id. at 567 (emphasis supplied).

Congress has enthusiastically agreed. In enacting the Cable Television Consumer Protection and Competition Act of 1992, Congress recognized the importance of the EEO Rule in promoting diversity:

The Courts and the Commission have consistently recognized the increasing amount of programming designed to address the needs and interests of minorities and women is fundamentally related to the number of minority and women employees in the upper level positions within media companies. In addition, the Committee recognizes that a strong EEO policy is necessary to assure that sufficient numbers of minorities and women gain professional and management level experience within the television industry, and thus that significant numbers of minorities and women obtain the background and training to take advantage of existing and future television broadcasting ownership opportunities....The Committee notes that women and minorities are still significantly under-represented as employees and owners in the industry.

H.R. Report No. 102-628, 102d Cong., 2d Sess. 144 (1992).

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the role model for the rest of society^{29/} and sets the tone for

28/ [continued from p. 18]

Last year, the Federal Glass Ceiling Commission recommended that the broadcasting industry "recognize the urgency of getting women and minorities into decisionmaking positions, especially in television." Federal Glass Ceiling Commission, "A Solid Investment: Making Full Use of the Nation's Human Capital, Recommendations of the Federal Glass Ceiling Commission," November, 1995 ("Glass Ceiling Recommendations"), p. 47.

29/ In 1963, the Commission advised Congress that Americans' television service has a "vast impact on their lives and the lives of their children...They are the owners of the channels of television - indeed, of all broadcasting." FCC, Television Network Program Procurement, H.R. Rep. No. 281, 88th Cong., 1st Sess. 20 (1963). Thus, when it first considered adopting the EEO Rule, the Commission cited with approval this statement by the Department of Justice:

Because of the enormous impact which television and radio have upon American life, the employment practices of the broadcasting industry have an importance greater than that suggested by the number of its employees. The provision of equal opportunity in employment in that industry could therefore contribute significantly toward reducing and ending discrimination in other industries.

Nondiscrimination - 1968, 13 FCC2d at 771. As the Glass Ceiling Commission observed,

[t]he media do not reflect America so much as shape America. The media play a critical role in developing and eliminating stereotypes and biases that affect the way minorities and women are viewed in society at large and in the workplace.

Glass Ceiling Recommendations, p. 46.

public debate in a democratic society.^{30/} The EEO Rule promotes diversity in a content-neutral manner which neatly corrects the basic market imperfection of advertiser supported commercial broadcasting and corporate donor-supported public broadcasting: broadcast revenues do not come directly from broadcast consumers. Although broadcast audiences are predominately and disproportionately minority and female, the advertisers and sponsors who inexactly translate product demands into advertising buys and sponsor contributions are predominately and disproportionately White and male. Thus, the EEO Rule helps to counterbalance the audience's inability to directly influence the content they are receiving.

Second, the EEO Rule gives life to the requirement that stewards of the airwaves exhibit some measure of character.^{31/} The

^{30/} Diversity of voices is especially critical in elections, when stereotypes about minorities are often used as cynical ploys for votes, and the media's role in legitimizing a candidate may hinge on that candidate's race. See generally C. Anthony Broth, A Horse of a Different Color: Television's Treatment of Jesse Jackson's 1984 Presidential Campaign (1987). That is why the exclusion of minorities and women from these industries would be profoundly antidemocratic.

^{31/} Quality assurance of broadcasters' character has always been a primary reason for the EEO Rule. Nondiscrimination - 1968, 13 FCC2d at 771. Beginning with Chapman Television and Radio Co., 24 FCC2d 282 (1970) ("Chapman"), the Commission has recognized that discriminators lack the requisite character to serve as Commission licensees. Id. (hearing issues enlarged to consider applicant principal's role in developing and covering up the segregation policies of a cemetery he partly owned). This principle was extended to sex discrimination in Henderson Broadcasting Co., Inc., 54 FCC2d 71 (Rev. Bd. 1975) ("Henderson"), when the Review Board added a discrimination issue when a major stockholder in an applicant for a construction permit was found guilty of sex discrimination in his insurance business.

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EEO Rule stands for the proposition that broadcasters must be held to a higher standard than the morals of the marketplace.^{32/}

Third, the EEO Rule helps remedy the present effects of the Commission's long history of perpetuating discrimination by looking the other way as it gave discriminators valuable broadcast licenses and repeatedly renewed those licenses.^{33/}

3. **The NPRM rings in disharmony with the civil rights policies of the President and Congress**

In his July, 1995 Affirmative Action Address, the President promised that the federal government would not retreat from affirmative action:

Affirmative action has not always been perfect, and affirmative action should not go on forever: It should be changed now to take care of those things that are wrong, and it should be retired when its job is done. I am resolved that that day will come. But the evidence suggests, indeed screams, that that day has not come.

President William Jefferson Clinton, "Affirmative Action Address," The Rotunda, National Archives, July 19, 1995 ("Affirmative Action Address"), p. 14.

^{31/} [continued from p. 20]

The D.C. Circuit agrees that "[a] documented pattern of intentional discrimination would put seriously into question a licensee's character qualifications to remain a licensee: intentional discrimination almost invariably would disqualify a broadcaster from a position of public trusteeship. Where responsible and well-pleaded claims of discrimination have been made, therefore, the FCC may be required to hold a hearing to resolve these charges before granting a license renewal." Bilingual II, 595 F.2d at 629.

^{32/} See Greater Boston Television Corp. v. FCC, 447 F.2d 841 (D.C. Cir. 1971) (subsequent history omitted).

^{33/} See pp. 141-154 infra.

The President's message was one of high principle and conviction. It resonated with millions of women and people of color, providing hope that his administration would stand firm in defense of federal programs which ensure that those historically excluded from the mainstream of society will have an equal opportunity to compete for contracts and for jobs.

The Justice Department has firmly underscored the President's message of hope and opportunity. Programs such as the EEO Rule have the ringing endorsement of the Assistant Attorney General for Civil Rights, who has declared that

this Administration is committed to the goal of expanding opportunity for all Americans in education, employment, and the economy generally. There will be no retreat from that commitment. It is our starting point for any discussion of affirmative action....

Testimony of Deval L. Patrick, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, Before the Subcommittee on Employer-Employee Relations, Committee on Economic and Educational Opportunities, United States House of Representatives, March 24, 1995, at 2. The Justice Department's Office of Legal Counsel has expressed the administration's approval of programs whose "objective...is to expand the pool of applicants...to include minorities, not to use race or ethnicity in the actual [hiring] decision." Memorandum to All Agency General Counsels from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, United States Department of Justice (June 28, 1995) at 7 (fns. omitted).

To appreciate the distance between NPRM and the President's civil rights enforcement policy, it is worth noting that the FCC -- which in 1968 was the first federal agency to require equal

opportunity for its licensees -- is today "first" again -- the first federal agency to propose a serious cutback in equal opportunity enforcement not motivated by constitutional concerns.^{34/}

In addition to disregarding the President's views, the NPRM disregards the will of Congress. Notwithstanding the unfortunate pronouncements of a handful of Members who represent the dying values of the "old South",^{35/} Congress as a whole has repeatedly endorsed full equal opportunity in broadcasting.^{36/}

^{34/} The FCC's vacillation on EEO contrasts sharply with the direction taken by other federal agencies having civil rights enforcement responsibility. For example, OFCCP plans to dispatch testers to apply for work with federal contractors in several states. They will come equipped with equal job-application factors, such as qualifications, credentials and experience. OFCCP will use the results of its testing to determine whether employment discrimination occurred, and if it did, "the agency plans to launch a full compliance inquiry to assess the contractor's overall practices and determine if a pattern of discrimination exists." Fair Employment Report, May 8, 1996 at 73.

^{35/} This is an opportune time to remember that "an agency may not repudiate precedent simply to conform with a shifting political mood. Rather the agency must demonstrate that its new policy is consistent with the mandate with which Congress has charged it." NBMC, 775 F.2d at 356 n. 17.

^{36/} In 1984, Congress prohibited cable companies from race and gender discrimination and imposed cable EEO requirements. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 1 et seq., 98 Stat. 2779 (1984). In 1992, Congress found that minorities and women were underrepresented in managerial positions in broadcast and cable, and that diversity of viewpoints would be advanced by increasing their representation. H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 111 (1992). Congress directed the Commission to increase its EEO efforts by conducting midterm review of TV stations, and endorsed the EEO Rule and Forms for TV stations by prohibiting the Commission from amending them. 1992 Cable Act, 47 U.S.C. §334 (1992).

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In its recent ringing endorsements of children's television and public broadcasting, the Commission has shown that it is capable of exercising genuine leadership even in the face of opposition from powerful members of the industry and the legislature. The Commission should exercise that same leadership here. It can do so by designing a plan to achieve the end of discrimination and its present effects. Upon reaching that goal, the Commission may follow the President's advice that an affirmative action program "should be retired when its job is done," Affirmative Action Address, p. 14. Thereupon, the Commission need only leave in place a small monitoring staff to ensure that there is no unanticipated return to a pattern of unequal opportunity. Nothing would make the civil rights community happier than no longer having to have to worry about EEO enforcement.

This is not an impossible dream. As shown infra, minorities and women in broadcasting have already achieved full equal opportunity in the "office and clerical" category. Minorities' and women's networking ability in that job category renders an EEO program aimed at that job category superfluous. The Commission can

36/ [continued from p. 23]

This year, in adopting the Telecom Act, Congress strengthened its commitment to nondiscrimination protection by amending Section 151 of the Act to now state that the Commission has statutory authority for "regulation of communications by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin or sex...." Telecommunications Act of 1996, Pub. L. No. 104, 110 Stat 56 at §104, codified at 47 U.S.C. §151 (1996). Indeed, in preparing the Telecommunications Act, Congress examined every FCC program with excruciating care. However, Congress has not instructed the Commission to take steps to exempt a substantial number (let alone most) broadcasters from EEO compliance responsibilities.

deregulate that job category (and the other "bottom five" job categories) now, and focus its limited resources elsewhere.^{37/}

The comprehensiveness of our Comments reflects our genuine expectation that the Commission has not closed its mind to the need to change course and strengthen its EEO program.^{38/} We would not object at all if EEO enforcement can be strengthened in a way that

^{37/} In one top four job category -- broadcast sales -- women are fast approaching equal opportunity. Within the foreseeable future, an EEO program for women, aimed at that category, may no longer be necessary. See Table 2, p. 38 infra.

^{38/} Our faith that justice can prevail must truly be unbounded, given the history of the Commission's treatment of civil rights litigants in rulemaking proceedings. That sordid history is set out in the NAACP's "Partial Opposition to 'Motion for Remand of Record', and Motion to Require Hearing on Remand" in South Carolina State Conference of Branches of the NAACP v. FCC, No. 92-1159 (D.C. Cir., pleading filed June 2, 1993) (the merits of the pleading were not ruled upon), pp. 9-13 n. 8, which is found at Exhibit 7 to the National Council of Churches et al.'s "Petition for Reconsideration and Clarification" filed in this proceeding on April 11, 1996.

Suffice it to say that the Commission's treatment of civil rights litigants would never be tolerated were it visited on telephone companies or nonminority broadcasters. For example, in Citizens Communications Center, 61 FCC2d 1095, 1103 (1976), the Commission denied all 62 civil rights proposals a citizen group had filed in 1973. Dissenting in part, Commissioner Hooks declared that "it is all but inexcusable for this Petition to have been unanswered for a period approaching three years. When the Commission is accused by its detractors of being unresponsive to the public interest groups, the procrastination here can be pointed to as a sterling example of studied inaction."

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magically also happens to "reduce burdens" for nonminority^{39/}

38/ [continued from p. 25]

This spring, in a matter deemed "complex," it took the Commission just four days to assign a rulemaking number, and three weeks to issue a public notice, in response to a trade organization's objections to the use of the Internet for non-tariffed long distance service. In doing so, the Commission declared that "[w]hen petitions for rulemaking are filed with the Commission, a public notice is routinely issued shortly after the petition is filed." "Common Carrier Bureau Clarifies and Extends Request for Comment on ACTA Petition Relating to 'Internet Phone' Software and Hardware", RM No. 8775, Public Notice, DA-96-414, Report No. CC-96-10 (released March 25, 1996). Yet the NAACP, the Office of Communication of the United Church of Christ and several other national organizations have had EEO rulemaking proposals pending (with a request for an "RM" number) in two EEO-related proceedings for two and three years respectively, without action. See Implementation of Section 22 of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-261 (NPRM), 8 FCC Rcd 266 (1993) ("EEO NPRM - 1993"); Implementation of Section 22 of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-261 (Report and Order), 8 FCC Rcd 5389 (1993) (reconsideration pending) ("EEO R&O - 1993"); Implementation of the Commission's Equal Employment Opportunity Rules (NOI), 9 FCC Rcd 2047, 2050 ¶24 (1994) ("EEO NOI - 1994") (which expressly asked whether the broadcast EEO enforcement program is "adequate regarding the promotion and retention of minority and female employees, and, if not, to what extent should changes be made?") Even in the instant proceeding, where an RM number could routinely have been assigned, none was.

Nonetheless, we look forward to the Commission's serious attention to our recommendations. See Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company, 463 U.S. 29, 42 (1983) (Commission must consider and respond to alternative proposals); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971) and Weyburn Broadcasting Limited Partnership v. FCC, 984 F.2d 1220, 1227-28 (D.C. Cir. 1993) (agencies must consider all relevant factors); cf. NCCB v. FCC, 597 F.2d 1095 (D.C. Cir. 1977) (even where consideration of logical alternatives may be excused, it is certainly unwise).

39/ All three minority broadcast station owners' organizations, by joining in these Comments, manifest that they are unequivocally opposed to the principal proposals in the NPRM and do not feel at all "burdened" by the opportunity to provide equal employment opportunity to all.

broadcasters.^{40/} However, as shown infra, full equality will not necessarily come cheaply. Everyone who's ever voted on a school bond issue knows that quality education cannot be assured with an attitude which says "we're open to proposals which will improve our children's education only if they also reduce taxes." Nothing worthwhile, whether it be education, clean air, safe food and water, child protection, airline safety, diversity of voices or a discrimination-free workplace, comes free. There is a "burden" involved, and someone must bear and share it.

The Commission appropriately concerns itself with "burdens" when it remembers that the end of discrimination will lift huge financial burdens from the shoulders of broadcasters. See pp. 107-116 infra. Dr. Everett C. Parker, who founded the Office of Communication of the United Church of Christ in 1954 and is

^{40/} We have never sought burdens for their own sake. Indeed, the civil rights community has long advocated burden-relieving means of promoting enforcement, but the Commission has filed these proposals away and forgotten them. For example, in The Advancement of Black Americans in Mass Communications, 76 FCC2d 385 (1980), the petitioner for rulemaking proposed three sanctions for EEO violations which would be less burdensome than denial of renewal: "(a) license suspension, under which the licensee could continue operations but profits would for a specified period go to a nonprofit group; (b) partial revocation, which would require time-sharing for certain hours each day; (c) rehabilitative relief, under which, for example, a licensee not conforming with our EEO rules might be required to finance minority training programs." The Commission held that the "suggestion that alternative sanctions be utilized may be a useful one" and it referred the matter to the Broadcast Bureau for its consideration. Id. at 393. The petitioner is still waiting for the fruits of the Broadcast Bureau's consideration.

In these Comments, we have left no stone unturned in an attempt to identify any portions of a campaign to eliminate discrimination and its present effects which might fortuitously cost nothing or reduce costs. See pp. 346-364 infra. But while we have developed several such proposals, we emphasize that they are, by themselves, patently insufficient to address the need to eliminate discrimination and its present effects in our lifetimes.

generally considered the father of the EEO Rule, explains that when the Commission adopted the Rule, it understood that

an integrated national workforce -- stimulated by the leadership of the broadcasting industry -- would serve as a powerful engine to fuel economic growth and competition, resulting in stronger market power and earnings for American companies -- including broadcasters....a number of farsighted broadcast executives came to realize that ending discrimination and its present effects had profound economic implications. They appreciated that the underutilization of minorities and women imposed tremendous economic burdens on the broadcasting industry, while the full inclusion of all talented Americans in the broadcasting industry was fundamental to the industry's competitiveness and economic health.

See Exhibit 4 hereto (Declaration of Dr. Everett C. Parker). Dr. Parker urges the Commission to

take a farsighted view of the basic question in this rulemaking proceeding: What is a "burden?" Ending discrimination and its present effects will do far more than any of the short-sighted proposals in the NPRM to "reduce burdens on broadcasters." The time has come for the Commission to lift permanently from broadcasters the burden of economic inefficiency generated by inequality of opportunity.

Thus, the Commission should construe the scope of this proceeding as broadly as possible, encompassing all proposals from all litigants,^{41/} encompassing both radio and television to the

^{41/} See Implementation of BC Docket 80-90 to Increase the Availability of FM Broadcast Assignments, Second Report and Order, 101 FCC2d 638, recon. denied, 59 RR2d 1221 (1985), aff'd sub nom. NBMC v. FCC, 822 F.2d 277 (2d Cir. 1987), in which the Court held that although the applicable notice of proposed rulemaking only related to Docket 80-90 FMs, the extension of Docket 80-90 FM filing rules to non-Docket 80-90 FMs was consistent with the notice and comment requirements of §553 of the APA. Thus, although the NPRM is aimed primarily at soliciting proposals which "ease paperwork burdens", the scope of this proceeding may also fairly include proposals which seek to ease the burden of discrimination on broadcasters and society in general. See pp. 107-116 infra.

extent permitted by law.^{42/} The Commission should do what it promised just two years ago in Implementation of the Commission's

^{42/} The limitations on revised EEO regulation of television, as imposed by 47 U.S.C. §334(a) (1996) are not as sweeping as the Commission might believe. 47 U.S.C. §334(c) modifies §334(a) to allow modifications which do not create new law. Section 334(c) provides that "[t]he Commission may revise its regulations described in [47 U.S.C. §334(a)] to make nonsubstantive technical or clerical revisions in such regulations as necessary to reflect changes in technology, terminology, or Commission organization." Section 334(c) should be broadly construed in light of the remedial purpose of the statute:

(a) Findings. The Congress finds and declares that -

(1) despite the existence of regulations governing equal employment opportunity, females and minorities are not employed in significant numbers in positions of management authority in the cable and broadcast television industries;

(2) increased numbers of females and minorities in positions of management authority in the cable and broadcast television industries advances the Nation's policy favoring diversity in the expression of views in the electronic media; and

(3) rigorous enforcement of equal employment opportunity rules and regulations is required in order to effectively deter racial and gender discrimination.

See Pub. L. 102-385, Section 22(a); see Conference Report, No. 102-862, 1992 U.S. Cong. and Admin. News 1231, 1279. In light of Congress' findings that past regulatory initiatives were insufficient to remedy the lack of equal opportunity in television, no needlessly narrow reading should be assigned to Section 334(c). In particular, those proposals herein which amplify upon, explain, or remove past discretionary elections not to enforce portions of the EEO Rule are unaffected by Section 334(a), or are encompassed by Section 334(c). Similarly, the development of specialized reporting forms which simply accommodate preexisting substantive requirements is clearly permissible under Section 334(a). Clarifying rulings which only shift emphasis without creating material new substantive rules would "merely [make] explicit what was readily inferable from the earlier rulings." Marin TV Services Partners, Ltd. v. FCC, 993 F.2d 261, 263-64 (D.C. Cir. 1993).

Equal Employment Opportunity Rules (Report), 9 FCC Rcd 6276, 6313 (1994) ("EEO Report - 1994") when it concluded that

[o]ur review reveals that our present policies have been and are effective in promoting equal employment opportunities in the broadcast and cable industries. However, more progress can and should be achieved. Accordingly, we should attempt to further improve our policies in these areas.

Above all, the Commission should point to the right field fence of discrimination, declare that it will hit a home run over that fence, and do so -- by the year 2009, as detailed below.

B. The Commission should aim to abolish discrimination in broadcasting by 2009

Station KQW, San Jose, California "first broadcast in 1909 and ran a regular schedule in 1912", according to broadcast historian Sydney Head's seminal work Broadcasting in America (1956) at 108.

As a fitting 100th birthday present for KQW, the Commission should present the station a Certificate manifesting that in the broadcasting industry, discrimination and its present effects have been abolished, and that in broadcasting, as in other industries, further federal regulatory oversight to assure continued compliance will be unnecessary.^{43/}

We emphasize that the Commission should not present KQW with this Certificate, and declare victory over discrimination, until it really has conquered discrimination. The Commission should avoid

^{43/} See, e.g., Ella Fitzgerald v. Pan American World Airways, 229 F.2d 499 (2d Cir. 1956) (desegregating commercial aviation by invoking the Civil Aeronautics Board's governing statute to prohibit discrimination in airline ticketing without the need for continued federal oversight to insure compliance). Employment discrimination in broadcasting can be abolished too.

the Vietnam War model of declaring victory: lose, say you've won, then go home. After -- but only after -- discrimination and all of its present effects have been abolished, the Commission may terminate regulatory oversight. Thereafter, the Commission would require only a small monitoring staff to ensure that the disease of discrimination is truly conquered, and is not merely residing in a state of dormant remission from which it may emerge again to infect the population.

Is the end of discrimination possible within a time certain? Yes it is. For example, in 1971, when the Commission adopted the EEO Rule in essentially its present form, minorities were 8.0%, and women were 10.2% of fulltime professional broadcast employees. Today, minorities are 18.6%, and women are 34.5% of fulltime professional broadcast employees. See Table 1, p. 36 infra. Given perhaps just over a decade of modest enforcement, broadcasting could become the second industry^{44/} in which affirmative action could be declared to have achieved its goal.

How is the Commission to know when discrimination has been abolished? The answer may be found by recalling that the principal tool used to perpetuate the domination of White males in the broadcasting industry has been word of mouth recruitment. Word of mouth recruitment of White males by other White males is especially well suited to secret noncompliance -- a strategy discriminators must use where open noncompliance can result in denial of a

^{44/} The military is almost there. See Address of General Colin Powell, Republican National Convention, August 12, 1996 (federal government has a duty "not only to cut off and kill discrimination, but to open every avenue of educational and economic opportunity to those who are still denied access because of their race, ethnic background or gender.")

valuable license. However, when the representation of minorities and women in broadcasting reaches parity with minorities' and women's representation in the population^{45/} ("workforce parity") at all levels, including sales and senior management, word of mouth recruitment ceases to become a useful noncompliance tool. That desirable result will be reached because parallel minority and women's word of mouth networks will result in inclusion of talented minorities and women in all applicant pools and to certify that the procedures used to select employees from applicant pools are entirely nondiscriminatory.^{46/}

This underscores the importance of reliance on data confirming the full integration of minorities and women in senior management -- not just middle management, sales or professional

^{45/} When the Commission tracks minority and female advancement relative to demographic statistics, it should bear in mind that minorities and women are joining the workforce at a more rapid pace than White males. For minorities, immigration and a longer baby boom than experienced by Whites fuels this growth in labor force participation; for women, emancipation from traditional "homemaker" roles fuels this growth. See Mary Mattis, "Women's glass ceiling can be dismantled," Electronic Media, August 28, 1995: "Women constitute 45 percent of the work force and are more committed to their careers than ever, work later into pregnancy and return to work more quickly after childbirth. Nearly three out of five mothers with children 2 years of age or younger are in the work force, according to the Bureau of Labor Statistics."

^{46/} A fair question is whether, even after workforce parity in top management is achieved, discrimination-minded broadcasters could develop a strategy to replace word of mouth recruitment as a tool to implement discrimination. It is certainly conceivable that diehard segregationists might do this. See, e.g., Theodore Cross and Robert Bruce Slater, "Once Again, Mississippi Takes Aim at Black Higher Education," 12 Journal of Blacks in Higher Education 92 (Summer, 1996) (discussing state's plans to use test scores to severely limit Black enrollment at the University of Mississippi and other state institutions which discriminated for generations). We trust, though, that once women and people of color thoroughly populate the highest ranks of top management and ownership of our largest broadcast corporations, their networking ability and our democratic traditions will prevent racism and sexism from ever again threatening their position in society.

employment.^{47/} Full parity, measured in raw numbers on Form 395, does not necessarily predict the maintenance of nondiscrimination into the future, or training for entrepreneurship, when minorities and women lack real power in a corporation.^{48/}

Can full integration be achieved by the year 2009? The answer is yes. Minorities and women are already securely established in broadcast clerical jobs; see Table 2, p. 38 infra.

^{47/} According to the Federal Glass Ceiling Commission, "[a] 1990 Business Week profile of the chief executives of the 1000 most valuable publicly held U.S. companies showed that the critical career path for senior management positions in Corporate America historically has been finance, marketing, or operations - those areas that are likely to be directly related to a corporate bottom line. Therefore, it is significant that African American men and women are underrepresented in finance, marketing, and operations....African Americans who are at the professional and managerial levels in major mainstream corporations are clustered in the areas of community relations, public relations, personnel and labor relations, and affirmative action/equal employment opportunity areas." Federal Glass Ceiling Commission, "Good for Business: Making Full Use of the Nation's Human Capital: The Environmental Scan, A Fact-Finding Report of the Glass Ceiling Commission" (1995) ("Glass Ceiling Environmental Scan"), p. 78.

^{48/} See EEO Report - 1994, 9 FCC Rcd at 6327 (Separate Statement of Commissioner Susan Ness): "[t]he modest advances in broadcast employment that have been made by minorities and women deserve recognition. However, I find that the overall results are inadequate, particularly in top positions such as group manager, general manager, station manager, and sales manager. One of my goals is to ensure that there are meaningful opportunities for minorities and women not only to be hired, but also to rise to the top management positions at communications companies. These promotional opportunities are essential to provide experience and to position minorities and women for ownership. Experienced management is a critical component to attract media financing." Commissioner Ness' remarks ring in harmony with those of the President in his Affirmative Action Address, when he noted with dismay that "in the nation's largest companies only six-tenths of one percent of senior management positions are held by African Americans, four-tenths of a percent by Hispanic Americans, three-tenths of a percent by Asian Americans; women hold between three and five percent of these positions. White males make up 43 percent of our work force, but hold 95 percent of these jobs." Affirmative Action Address, p. 8.

Furthermore, minorities and women are near parity in the lowest level professional and sales assistant jobs -- the first step up the corporate ladder leading to top management. Given the workplace trends documented by the Federal Glass Ceiling Commission, it is reasonable to predict that those who assumed those positions in the early 1990's would attain top management roles by 2009 if the Commission accelerates its commitment to strong EEO enforcement.^{49/}

Discrimination has been with us for 400 years, and eliminating it will take work, commitment and courage. But Colin Powell stated it well: "It Can Be Done."

^{49/} According to the Glass Ceiling Commission, "[c]orporate leaders estimate that it takes 20 or 25 years in a corporation to achieve a high-level management position. That means that businesses who sought inclusion in the late 1960s are now cracking the ceiling, while most of those who started later are far behind. Using that same measure, businesses that are just beginning to diversify their workforces are unlikely to see significant change at the senior levels until well into the 21st century. This is not meant to be a justification for lack of progress. It is a warning - the later a business starts, the later it will get where it is going." Glass Ceiling Environmental Scan, p. 36.

II. Baseline Data On Broadcast EEO

Before turning to our analysis of the NPRM's proposals and presenting our own recommendations, we begin with a summary of our research into three key sets of questions which present the starting point for any informed analysis:

1. What is the representation of minorities and women in broadcast employment? In which categories are minorities and women best and least well represented? Is their representation growing, and if so, at what rate? At that rate of growth, how long will it take for minorities and women's representation in broadcast employment to reach parity with their presence in the population? See pp. 35-44 infra.
 2. What proportion of broadcasters undertake vigorous EEO efforts, and what proportion achieve solid EEO results? What market, demographic, and station characteristics factors determine a broadcaster's success in its EEO efforts? Which EEO techniques seem most likely to generate EEO results? See pp. 45-52 and Exhibit 1 infra.
 3. How much does the FCC fine broadcasters for EEO violations? Do the FCC's EEO forfeiture amounts correlate with the type and size of the station or the size of its market? See pp. 52-55 and Exhibit 2 infra.
- A. National Trends In Minority And Female Employment In The Broadcasting Industry

For the past decade, MMTC has tracked minority and female professional employment -- probably the most volatile indicator of opportunity in the broadcasting industry, owing to the tendency of employers undergoing consolidation to lay off professional personnel more readily than other personnel. The data shown below, derived from the Commission's annual EEO Trend Reports, begins in 1971, the year the Commission adopted the EEO Rule in essentially its present form. It illustrates the slow but steady progress minorities and women have enjoyed.

TABLE 1

**Employment of Minorities and Women in Fulltime
Broadcast Professional Capacities, 1971-1995**

<u>Year</u>	<u>% Minority Professionals</u>	<u>% Female Professionals</u>
1995	18.6%	34.5%
1994	17.2%	33.1%
1993	17.2%	33.1%
1992	17.4%	32.9%
1991	16.6%	32.8%
1990	16.2%	31.9%
1989	15.8%	31.8%
1988	15.0%	31.3%
1987	14.7%	30.8%
1986	14.4%	30.3%
1985	14.3%	29.9%
1984	13.8%	29.7%
1983	13.7%	29.0%
1982	13.9%	28.0%
1981	13.9%	27.3%
1980	13.4%	25.7%
1979	13.3%	24.0%
1978	12.5%	22.3%
1977	12.2%	20.1%
1976	11.9%	18.5%
1975	11.5%	16.8%
1974	10.9%	15.0%
1973	10.1%	12.9%
1972	8.7%	9.7%
1971	8.0%	10.2%

As shown in Table 1, minorities were 8.0% of fulltime broadcast professional employees in 1971. In 1995 (the last year for which data is available), minorities were 18.6% of fulltime broadcast professional employment. This rate of growth would never have been sustained without the FCC's EEO program.^{50/}

^{50/} A direct comparison with a similar field is impossible because there is no reasonably similar field. Our collective experience is clear, though: over the years, we have become aware of dozens of hiring decisions which would not have been made, or which would have been less likely to have been made, but for the fact that (1) the nondiscrimination section of the EEO rule compelled station owners not to vest known racist and sexist middle managers with hiring responsibility; and (2) recruitment efforts, formerly limited to word of mouth contacts among White males, were opened up to include minorities and women, who then had an opportunity to be interviewed and receive merit consideration.

Data in the EEO Trend Report - 1995 permits an iteration of the extent to which minorities and women have succeeded in reaching national workforce parity in a number of job categories. That data, as derived by MMTC, is given below in Table 2.^{51/}

^{51/} As used throughout this report, "percentage of parity" refers to the ratio between the percentage of a protected group (minorities or women) in a given category of broadcast employment and the percentage that group represents in the national workforce.

In Tables 2-4, data for commercial radio and noncommercial radio were combined, and data for commercial television and noncommercial television were combined. Data reported as "Radio and Television" includes all broadcast stations and excludes Headquarters data. Data for Office and Clerical employees is broken out because it is the only one of the "bottom five" job categories in which more than 1,000 persons were employed. There were 15,714 persons employed in this category in 1995. There were not enough employees in the other four "bottom five" categories to permit meaningful analysis of national employment data.

All EEO data reflected or used by MMTC to derive the figures given in Tables 2-4 were derived from the EEO Trend Report - 1995. U.S. Census Bureau estimates give the percentage of minorities in the national workforce as 22.0% in 1991 and as 24.2% 1995, and give the percentage of women in the national workforce as 45.3% in 1991 and 45.9% in 1995.

TABLE 2

**PERCENTAGES OF PARITY ATTAINED BY MINORITIES
AND WOMEN IN SELECTED JOB CATEGORIES (1995)**

<u>Job Category</u>	<u>Protected Group</u>	<u>Radio</u>	<u>Television</u>	<u>Radio and Television</u>	<u>Head-quarters</u>
Officials/Managers	Minorities	55.6	59.1	57.2	49.8
	Women	74.3	80.0	76.7	63.8
Professionals	Minorities	72.0	80.3	76.5	75.7
	Women	55.1	91.7	76.7	98.9
Technicians	Minorities	93.4	98.4	98.0	70.8
	Women	19.7	32.8	31.6	36.4
Salespersons	Minorities	55.5	54.1	55.0	55.2
	Women	112.9	113.7	113.1	117.2
Top Four Categories	Minorities	63.8	78.5	72.6	64.1
	Women	74.5	71.5	72.7	74.7
Office & Clerical	Minorities	123.9	135.4	132.6	116.9
	Women	191.9	191.9	191.9	193.5

Table 2 clearly shows where the Commission should be focusing its EEO enforcement efforts. Secretarial positions no longer require FCC EEO enforcement, since minorities and women are represented so far in excess of parity that word of mouth recruiting by them may be relied upon to replenish their representation. Indeed, continued emphasis on secretarial or janitorial hiring could mislead broadcasters into thinking that the hiring of a minority or female secretary, receptionist or janitor immunizes them from the consequences of their failure to recruit for or hire minorities and women in the top four category positions.^{52/} See pp. 253-256 infra.

^{52/} Many broadcasters, responding to EEO allegations in petitions to deny, commonly invoke their employment of minorities or women in the "bottom five categories" as a shield to show supposed lack of any intention to discriminate against minorities in the top four categories. See, e.g., Northeast Kansas Broadcast Service, 11 FCC Rcd 4083, 4084 ¶¶10-11 (1996) ("Northeast Kansas").